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No. 08-1430

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MICKY A. SMITH AND J. SCOTT BROWN, *et al.*,
Petitioners,

v.

FORD MOTOR COMPANY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Oklahoma

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Respondents mistakenly argue that 28 U.S.C. §1257(a) does not grant this Court certiorari jurisdiction over this matter (Resp. Br. at 5-9).

In *ASARCO Inc. v. Kadish*, 490 U.S. 605, 606 (1989), this Court held that a "state court's erroneous interpretation of federal statutes" confers standing on parties affected by that state court ruling to invoke this Court's jurisdiction.

Of the four cases the Oklahoma Court of Civil Appeals relies on to support its unduly restrictive definition of "extraneous information," two are federal cases interpreting Fed. R. Civ. P. Rule 606(b), which is virtually identical to 12 Oklahoma Statutes §2606(B).[1] [Pet. App. 10a]

The first federal case is *Marquez v. City of Albuquerque*, 399 F.3d 1216 (C.A.10 2005), a 42 U.S.C. §1983 action in which the plaintiff claimed a police officer's use of a police dog during his arrest constituted excessive force (Id., p. 1219). The juror at issue, who had prior experience in training police dogs, made three assertions during deliberations: "(1) Police dogs do not bite unless the suspect is fleeing; (2) The injuries suffered by Marquez from the bite were not serious; and (3) Police dogs do not bite the first part of the body they come across." [Id., p. 1223] But these assertions were of no relevance to the issue before the jury because: (a) the 4th Amendment does not require use of the "least intrusive means" in the course of an arrest (Id., ¶8); and (b) not

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[1] The only substantive difference between the two statutes is that the Oklahoma statute does not allow juror testimony on whether a mistake was made entering the verdict on the verdict form.

even violations of state law and police procedure generally constitute excessive force (Id., ¶9); therefore, (c) the only issue before the jury was whether the officer in question (not the dog) had acted reasonably (Id.).

The court should have known from these basic facts that *Marquez* was distinguishable from the instant case, because the actions of Messrs. Melton and Crane had a direct bearing on issues crucial to the jury's determination. Furthermore, the *Marquez* court based its holding principally on *U. S. ex rel. Owen v. McMann*, 435 F.2d 813 (C.A.2 1970),[2] a fair reading of which demonstrates that the *Marquez* court quoted it out of context:

> Here the alleged "extraneous prejudicial information" was the juror's personal experience with training police dogs. A juror's personal experience, however, does not constitute "extraneous prejudicial information." [citation omitted] As the Second Circuit stated, "the inquiry is not whether the jurors "became witnesses" in the sense that they discussed any matters not of record, but whether they discussed specific extra-record

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[2] Petitioners would note in passing that *McMann* lends further support to our proposition that extraneous information can originate in the deliberation room: "There is no rational distinction between the potentially prejudicial effect of extra-record information which a juror enunciates on the basis of the printed word and that which comes from his brain. As we pointed out in *United States v. Crosby, supra*, 294 F.2d at 950, it is the 'nature of the matter and its probable effect on a hypothetical average jury,' not the source of the information or the locus of its communication, which determines whether the defendant has been prejudiced." [*McMann* at 820]

> *facts* relating to the defendant, and if they did, whether there was a significant possibility that the defendant was prejudiced thereby." *United States ex rel. Owen v. McMann*, 435 F.2d 813, 818 n. 5 (2nd Cir.1970) (emphasis and quotation marks in original); *see also Hard v. Burlington N. R.R. Co.*, 870 F.2d 1454, 1462 (9th Cir.1989) (holding that a juror's personal familiarity with reading x-rays was not extraneous prejudicial information). [*Marquez* at ¶11]

At issue in *McMann* were, not statements made by jurors about cardinal *evidence*, but statements made about the *character of the defendant* himself in a criminal prosecution (*McMann* at 815). Thus, the court in the case at bar should have discerned that *Marquez* was inapposite and, therefore, does not support the conclusion it reached in this case. By citing it in the particular fact-scenario of this case, the court has ascribed to Fed. R. Civ. P. Rule 606(b) an unduly restrictive definition of "extraneous prejudicial information."

Though, in footnote 6, the court in the case at hand correctly reports the holding in *Hard* (870 F.2d 1454) ("Hard 2"), it erroneously interprets the broader principles espoused therein, as well as the body of prior case law on which they are based, including a case decided by this very Court nearly half a century ago.

While the court in *Hard 2* did hold that a juror's experience in reading x-rays did not constitute extraneous prejudicial information (Id. at 1462), it did so only after remanding the matter to the trial court for further investigation into that particular juror's personal experience:

> In *Hard I* we held that if a juror's past experiences were **directly related to the litigation** . . . the discussion of those experiences would constitute extraneous information that could be used to impeach a jury's verdict. [Id., ¶8; emphasis added]

In that case, the petitioner asserted that a juror had used his background in x-ray interpretation to persuade his fellow jurors that the plaintiff's x-rays did not show a back injury (Id., ¶9). On remand, the trial court found the evidence inconclusive (Id.). Based on that finding, the court held:

> While **it is clearly improper for jurors to decide a case based on personal knowledge of facts specific to the litigation**, a basic understanding of x-ray interpretation falls outside the realm of impermissible influence.
>
> Irrespective of juror Fraser's alleged familiarity with x-rays, the jury had ample evidence from which to conclude that Hard's alleged back injury was not caused by the litigated accident. [Id., ¶10; emphasis added]

By contrast, Petitioners here demonstrated that Foreman Melton did not merely draw upon his general experience as an airplane mechanic. He imposed his superior knowledge of physics and forces upon deliberations, generating his own evidence in the jury room to convince his subordinate jurors of a theory—related to a fact that was not only specific but *pivotal* to the case—that contradicted the totality of evidence presented at trial, thus materially altering the verdict. In like manner, Juror Crane imparted to his fellow jurors the specter of federal regulations (per-

sonal experience) not admitted or even discussed at trial to contradict testimony regarding the use of dial indicators (a fact specific to the case).

In *Hard 1*, 812 F.2d 482 (C.A.9 1987), the court specifically held:

> Jurors must rely on their past personal experiences when hearing a trial and deliberating on a verdict. **Where, however, those experiences are related to the litigation, as they are here, they constitute extraneous evidence which may be used to impeach the jury's verdict.** [Id., ¶6; citations omitted; emphasis added]

The *Hard 1* court cited *Government of Virgin Islands v. Gereau*, 523 F.2d 140 (C.A.Virgin Islands 1975), in which the court held:

> **And where jurors consider evidence, in the form of either fact or opinion, which has not been introduced in court**, the confrontation and counsel rights of an accused are obviated as regards the particular evidence received. [Id., ¶9; emphasis added]

In turn, the *Gereau* court cited *Parker v. Gladden*, 385 U.S. 363 (1966), in which this Court held:

> . . . **the evidence developed against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel**. [text omitted] We have followed the undeviating rule that the rights of confrontation and cross-examination are among the fundamen-

> tal requirements of a constitutionally fair trial. [Id., ¶4, emphasis added]

The Court then rejected the argument that the statements at issue were harmless because (a) 10 jurors had testified they had not heard the statements and (b) only 10 votes were needed for a verdict, finding:

> . . . one of the jurors testified that she was prejudiced by the statements, which supports the trial court's finding that the unauthorized communication was prejudicial and that such conduct materially affected the rights of the defendant. [Id., ¶6; citations omitted]

Finally (¶5), this Court alluded to the bedrock principle coined by Justice Holmes a century ago:

> The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print. [*Patterson v. People of State of Colorado ex rel. Attorney General of State of Colorado*, 205 U.S. 454, 462 (1907)]

CONCLUSION

A diligent reading of the *Hard* cases should have alerted the court that (a) the extraneous information analysis must be performed on a case-by-case basis and (b) the facts of the present case warranted an in-depth inquiry. Had the court conducted such an inquiry, the facts in the record should have led it to a different conclusion about the actions of Foreman Melton and Juror Crane. By ignoring the wealth of authority on which *Hard 2* was based and merely using the holding in that particular fact-scenario to bolster its position, the court not only misconstrued Fed. R. Civ. P. Rule 606(b); it misused it altogether.

Plaintiffs therefore submit that this Court has jurisdiction to grant certiorari in this matter.

Respectfully submitted,

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